IN THE

Supreme Court of the United States

FEBRUARY TERM, 1944

No. 690

MAX KAPLAN and JACOB KAPLAN, co-partners, doing business under the firm name and style of KAPLAN BROS.,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT L. WASSERMAN,
Attorney for Petitioners.

INDEX

PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT OF PETITION

AUTHORITIES CITED

STATUTES AND RULES CITED

IN THE

Supreme Court of the United States

FEBRUARY TERM, 1944

No.

MAX KAPLAN and JACOB KAPLAN, co-partners, doing business under the firm name and style of KAPLAN BROS.,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Max Kaplan and Jacob Kaplan, co-partners, doing business under the firm name and style of Kaplan Bros., the petitioners herein, pray that a writ of certiorari issue to review the decree (R. 363-365) of the United States Circuit Court of Appeals for the Second Circuit, filed on November 17, 1943 (R. 365). Said decree granted the petition of the National Labor Relations Board to enforce its order in accordance with the Court's opinion, 138 F 2d 884, (R. 361-362).

A certified transcript of the record, including the proceedings in the Circuit Court of Appeals, has been filed and served in compliance with Rule 38 of this Court.

Summary Statement of Matter Involved

Re the Incidents Involved: Petitioners have been manufacturing artificial flowers since 1900 (R. 302). They have approximately 500 female employees in the decorative flower department (R. 223). Lombardi is the forelady in charge of these employees (R. 223). Doran was an employee, one of many floorgirls whose duty it was to distribute and collect the work of a small group of girls (R. 63).

The Board claimed that in June, 1941, Lombardi asked Doran and DeFilippi, another floorgirl, to dissuade the other employees from joining a union, because if a union was successful Petitioner would close down (R. 54). Doran admitted that she never bothered to influence any employee (R. 54).

Doran testified that on April 27, 1942, Lombardi stated to DeFilippi that she (Lombardi) knew that Doran had attended a union meeting (R. 60). On May 6, 1942 Lombardi discharged Doran (R. 75). They had an argument about the manner in which Doran was doing her work and the way in which she spoke to Lombardi. The Board claimed the circumstances connected with the discharge indicated it was because of Doran's union affiliation (R. 69-75). Lombardi denied having ever made anti-union statements (R. 233) and petitioners claimed the circumstances showed that the discharge was because Doran was insubordinate, disrespectful and disobedient (R. 228, 231-232). In spite of said conduct, Lombardi was willing to reinstate her if she would apologize, not for her union membership, but because of her conduct and actions toward Lombardi personally (R. 232-233).

Throughout all the proceedings, Petitioners objected and contended that the Board's evidence was not the substantial evidence required by law, but was based entirely on hearsay and circumstantial testimony (R. 329-

332, 61-62, 126-130, 167, 274). Petitioner further insisted that even if no defense had been interposed and it was held that the Board's evidence was credible, the happening of the two sporadic incidents over a period of almost a year would not justify the cease and desist provisions of the Board's order (R. 352-354). This was emphasized because there is absolutely no evidence, direct or indirect, that Petitioners ever had knowledge of these two incidents, assuming them to have occurred. There is no evidence that Louise Doran or any one else ever called them to the attention of Petitioners. In fact Doran testified she "didn't bother," after Lombardi spoke to her in 1941 (T. 54). There is no evidence that Lombardi ever insisted upon compliance with her request. There is no evidence that Doran was ever questioned in regard to union affiliations at the time she was hired nor was any other girl ever so questioned. There is no evidence, except in regard to the incident involved herein that any girl was ever discharged because of union membership. There is no evidence that Petitioners ever discouraged union membership. Aside from the two isolated instances there was no evidence that any supervisory employee ever mentioned union activity to any employee. There is no evidence that Petitioners ever coerced or interfered with the employees' right to organize. There is no evidence that Petitioners refused to bargain collectively.

However the Board found that Petitioners violated Secs. 8 (3) and 8 (1) of the Act and ordered Petitioners to:

"1. Cease and desist from:

(a) Discouraging membership in Textile Workers Union of America, Greater New York Joint Board, C.I.O., or any other labor organization in regard to the hire or tenure of employment or any term or condition of employment of their employees;

(b) In any other manner interfering with, restraining, or coercing their employees in the exercise of

> the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act." (R. 352-353.)

The Court below held that in regard to the discharge of Doran there was substantial evidence and it was possible to find either way (R. 361). In regard to Petitioners' objection to the breadth of the order as being contrary to this Court's decision in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 61 S. Ct. 693, the Court referred to its decision in *National Labor Relations Board* v. *Standard Oil Co.*, 138 F. 2d 885, handed down at the same time as the decision herein.

In the *Standard Oil Co.* case Judge Learned Hand wrote:

> "The next question concerns that part of the order —Article I (d)—which directs the respondents to 'cease and desist' from in 'any other manner' denying to their employees their rights secured under section seven. This the Board embodied in its order, in spite of the fact that the only 'unfair labor practice' of which it found the respondents guilty was that mentioned in § 8 (2): i.e., 'dominating' the 'Association.' That now seems to Judge Chase and me directly contrary to the ruling of the Supreme Court in Labor Board v. Express Publishing Co., 312 U.S. 426, which, as we understand it, limited the injunction to those 'unfair labor practices' of which the employer has been found guilty. It would follow that to issue an injunction under § 8 (1) the employer must have done something not specifically mentioned in the other subdivisions of § 8. The question first arose in this circuit in F. W. Woolworth Co. v. Labor Board, 121 Fed. (2) 658, 662 and very shortly thereafter in Labor Board v. Air Associates, 121 Fed. (2) 586, 592. Both concerned only violations of § 8 (3), yet in each case we sustained the broad clause. On the other hand less than two weeks

later in two decisions rendered almost simultaneously, we declared that, although the court as then constituted thought the clause improper we would yield to the authority of Labor Board v. Air Associates, supra. In the first of these two cases—Labor Board v. Moench Tanning Co., 121 Fed. (2) 951, 954—the violations were of § 8 (2) and § 8 (5), and in the second—Labor Board v. Federbush Company, 121 Fed. (2) 954, 957—they were of § 8 (5) alone. Finally, in Sperry Gyroscope Co. v. Labor Board, 129 Fed. (2) 922, 931, we sustained the clause when the violations were of § 8 (2) and § 8 (3). We have thus so often interpreted Labor Board v. Express Publishing Co., supra, in accord with the order before us, that it seems best to adhere to that interpretation until the Supreme Court passes upon the question again; especially as we infer from a number of cases that have recently come before us, that the Board uniformly incorporates the clause in its order. As the matter stands it can hardly serve to add to the confusion until some authoritative word shall be said."

In a concurring opinion Judge Clark wrote:

"As indicated in the opinion I agree except that for my part I am satisfied we are correctly applying the Express Publishing ruling. That ruling was explicitly restricted to the situation there present of failure of negotiations leading to the employer's refusal to bargain, contrary to § 8(5) of the Act, with a union in all other respects left undisturbed. But, as the Court says at page 434 of 312 U.S., this was 'wholly unrelated to the domination of a labor union or the interference with its formation or administration or financial or other support to it, 'contrary to § 8 (2), or discrimination against union employees, contrary to § 8 (3). The Court thus neatly separated the issue before it from the two most burning issues in labor relations—those of 'company unions' or of discriminatory treatment of employees—where violations go to the very heart of the Act. N.L.R.B. v. Entwistle Mfg. Co., 4 Cir., 120 F. 2d 532, 536; N.L.R.B. v. Air Associates, 2

Cir., 121 F. 2d 586, 592; N.L.R.B. v. Reed & Prince Mfg. Co., 1 Cir., 118 F. 2d 874, 891, certiorari denied 319 U.S. 595, 61 S. Ct. 1119, 85 L. Ed. 1549.

Hence I do not believe the Court intended drastically to limit the Board's discretion to determine the appropriate remedy to be applied in these two most important situations. In due course the Court may wish to define its ruling further; the justices were sharply divided the decisions provoked doubt among commentators,[1] and its effect has now to be sharply debated in most of the Board's cases coming before us. It appears to have been cited, with varying divergences, in some seventy-five cases in the little over two years since its rendition. But until we are told more, I am convinced our previous decisions should stand and do control here.

Re Back Pay: Paragraph 2 (b) of the Board's order provided that if Doran would not seek reinstatement she shall be paid from the date of her discharge to the date she received employment elsewhere (R. 353).

At the time of the hearing in July, 1942 Doran was employed elsewhere at a higher salary (R. 87). She was employed for a trial period which did not expire until August, 1942 (R. 91). She stated that she did not desire to be reinstated in her job with Petitioners if she could keep her new job (R. 90).

Petitioners contended that as long as Doran reserved the right to exercise an option as to whether or not she would return, her damage could only be determined as of the date she elected to return, or elected not to seek reinstatement.

The Court below held that the wrong so far as it can be measured in dollars ceased as soon as she began to earn as much elsewhere, and Petitioners were not entitled to a credit for any part of her wages during the probationary period (R. 362).

---

[1] 41 Col. L. Rev. 911, 29 Geo. L. J. 1026, 39 Mich. L. Rev. 1210, 27 Va. L. Rev. 956, 26 Wash. U. L. Q. 554; cf. 53 Harv. L. Rev. 472."

Jurisdiction

The decree of the Circuit Court of Appeals was filed on November 17, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. sec. 347 (a)); and Sec. 10 (e) of the National Labor Relations Act (29 U.S.C.A. Sec. 160 (e)), and under General Rule 38 of this Court, Section 5, subdivision (b).

Question Presented

1. Whether the decree (R. 363-365) containing the many cease and desist provisions was proper, particularly in view of the decision of this Court in *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 61 St. Ct. 693?

2. Whether the Board's Findings of Fact, Conclusions of Law and its Order, were based on substantial evidence?

3. Whether the award of back pay on the terms set forth in the decision of the Court below was proper?

Reasons for Granting the Writ

1. The opinion and decree of the Court below, in upholding the order of the Board, is contrary to and in conflict with the decision of this Court in *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 61 S. Ct. 693.

2. Many of the Circuit Courts of Appeal have rendered conflicting opinions as to whether this Court by its decision in *National Labor Relations Board* v. *Express Publishing Company* intended the law set forth in said case to apply only to the specific facts of said case and only to violations of Section 8(5) of the Act, or to other violations of Section 8 of the Act.

Circuit Court decisions holding that the Express Publishing Company law is not limited to the specific facts of that case are: Third Circuit, *National Labor Relations Board* v. *Newark Morning Ledger*, 120 F. 2d 262; Fifth Circuit, *National Labor Relations Board* v. *Tex-O-Kan Flour Mills*, 122 F. 2d 433; Seventh Circuit, *National Labor Relations Board* v. *Burry Biscuit Corporation*, 123 F. 2d 540; Ninth Circuit, *National Labor Relations Board* v. *Grower-Shipper Vegetable Assn. of Central California et al.*, 122 F. 2d 368; Tenth Circuit, *National Labor Relations Board* v. *Continental Oil Co.*, 121 F. 2d 120.

Circuit Court decisions holding that the Express Publishing Company law is limited to a violation of only Section 8(5) of the Act are: Second Circuit, *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586; Fourth Circuit, *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532.

3. The Circuit Court of Appeals for the Second Circuit is itself sharply divided as to whether the Express Publishing case enunciated principles affecting violations of all the subdivisions of Section 8 of the Act or was made applicable only to a violation of subdivision 5 of said Section. The Court consisting of Judges Frank, Swan and Clark in a decision written by Judge Frank in *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586, strictly limited the principle of the Express Publishing case to the exact facts of said case. In subsequent decisions of the Circuit Court of Appeals for the Second Circuit when Judges L. Hand, Swan and Chase were on the bench, Judge L. Hand wrote as follows:

> "The clause which incorporates verbatim et literatim the contents of § 7 the Court, as now constituted, thinks contrary to National Labor Relations Board v. Express Publishing Company, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed.—, but we have just held otherwise in a situation which so far as we can see is

indistinguishable for practical purposes, and we defer to the authority of our earlier decision National Labor Relations Board v. Air Associates, Inc., 2 Cir., 121 F. 2d 586."

National Labor Relations Board v. *Moench Tanning Co. Inc.*, 121 F. 2d 951, 954.

Again in a subsequent decision Judge L. Hand wrote:

"A majority of the Court as now constituted regards that provision of the order which incorporates § 7 in its exact words as contrary to National Labor Relations Board v. Express Publishing Company, 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed.—but we yield to our recent decision in National Labor Relations Board v. Air Associates, Inc., 2 Cir., 121 F. 2d 586."

National Labor Relations Board v. *Federbush Co. Inc.*, 121 F. 2d 954, 957.

Most recently in the Standard Oil Co. case, referred to in this very case the Court below again emphasized its division of opinion and restated its determination:

"to adhere to that interpretation until the Supreme Court passes upon the question again" (Petition, p. 5).

4. The question presented is of great public importance in the administration of the National Labor Relations Act, involving a vital question of Federal Law, which has been debated "with varying divergences in some seventy-five cases in the little over two years" (Petition, p. 6), since this Court rendered the Express Publishing decision.

5. The decree of the Court below in upholding the Findings of Fact and Conclusions of Law and Order of the Board defeats the basic law that the Board's Findings, Conclusions and Order must be supported by substantial evidence.

6. The opinion and decree of the Court below, in upholding the Board's method of computing back pay has adopted a new formula, which is in conflict with the decision of this Court in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348, 58 S. Ct. 904, 912.

WHEREFORE, your Petitioners referring to the annexed brief in support of the foregoing reasons for review, respectfully pray that the Honorable Court issue a writ of certiorari directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the decree of the Circuit Court of Appeals may be reversed and that your Petitioners may have such other and further relief as to this Honorable Court may seem just.

Dated, New York, N. Y., February 8, 1944.

MAX KAPLAN AND JACOB KAPLAN,
co-partners, doing business under the firm name and style of Kaplan Bros.,

Petitioners,

By HERBERT L. WASSERMAN,
Attorney for Petitioners.